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MOHD KHIRUDIN YAAKUB

v.

PP

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HIGH COURT SABAH & SARAWAK, KUCHING
ABDUL AZIZ ABDUL RAHIM J
[CRIMINAL APPEAL NO: 42-14-2008-II]
10 MARCH 2009

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CRIMINAL LAW: *Anti-Corruption Act 1997 - Section 11 - Soliciting and accepting RM100 by JPJ officer as inducement to refrain from taking action against traffic offender - Whether prima facie case established - Setting up of trap witnesses and recovery of trap money - Whether sufficient corroborative evidence available - Whether statutory presumption under s. 42(1) Anti-Corruption Act 1997 properly invoked*

D

EVIDENCE: *Adverse inference - Failure to produce witness - Witnesses not called by prosecution but offered to defence - Witnesses offered by prosecution not called by defence - Whether prosecution could invoke adverse inference under s. 114(g) Evidence Act 1950 - Burden of proof on prosecution - Misdirection by trial judge in requiring defence to call witness to prove his innocence - Adverse inference cannot be invoked - No miscarriage of justice occasioned by misdirection*

E

EVIDENCE: *Corroboration - Circumstantial evidence - Whether circumstantial evidence can be corroborative evidence*

F

EVIDENCE: *Witness - Credibility - Evidence of trap witnesses in corruption matter - Whether discrepancy in evidence of witnesses material - Whether finding of fact by trial who heard and saw witnesses should be disturbed or interfered with on appeal*

G

PW1 was stopped by the appellant (an Enforcement Officer with the Road Transport Department) while driving a motor vehicle. When PW1 could not produce his driving licence, the appellant took PW1's identity card but refused to issue PW1 with a summons. The appellant asked him to call the owner of the car (PW6). PW6 later came to the scene. The appellant then let PW1 continue on his journey but retained PW1's identity card stating that PW1 should go to the JPJ office later that day with RM100 to collect his identity card. PW6 then contacted the Anti Corruption Agency ('ACA') officers about the incident after which the ACA set up a trap. PW1 and PW6 went to the appellant's office with two fifty-ringgit marked notes and gave them to the appellant. The ACA

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officers then entered the appellant's office. On seeing the ACA officers, the appellant attempted to flush the notes down the toilet. The appellant was detained and one of the notes was recovered from the septic tank. The appellant was convicted and sentenced on an amended charge under s. 11(a) of the Anti Corruption Act 1997 ('the Act'). The appellant was sentenced to 12 months' imprisonment and a fine of RM10,000 in default six months' imprisonment. The appellant appealed against the conviction and sentence, *inter alia*, on the grounds that: (i) the prosecution had not established a *prima facie* case on the essential ingredients of the offence to justify the calling of the defence; (ii) the learned trial judge failed to warn himself that PW1 and PW6 were trap witnesses and as such their evidence must be corroborated; (iii) PW1 and PW6 had given two conflicting versions on the money given to the accused; (iv) the learned trial judge was wrong to draw adverse inference under s. 114(g) of the Evidence Act 1950 against the appellant for not calling Mr. Mora (the JPJ officer who had assisted the ACA's officers to recover the trap money from the septic tank); and (v) the trial judge erred in taking into consideration the evidence of PW9 who was also arrested in connection with the case.

Held (dismissing the appeal):

(1) The unbroken chain of events and evidence beginning from the setting up of the trap and the recovery of the trap money and the other items of exhibit from the toilet bowl and the septic tank provided sufficient corroboration to the story by PW1 and PW6. Corroborative evidence need not be direct evidence that the accused committed the crime. Circumstantial evidence can also be a corroborative evidence. (paras 22 & 23)

(2) The learned trial judge found that the discrepancy in the evidence of PW1 and PW6 as to the conflicting versions on the money given to the accused was not material and did not amount to a conflicting version of evidence. The learned trial judge was satisfied that as a whole the trapped money was found in the septic tank. This was a finding of fact by the trial judge who had the advantage of hearing and seeing the witnesses giving evidence before him and observing their demeanour. The trial judge therefore was the better judge of the fact in issue than the appellate court. Thus, such finding should not be easily disturbed or interfered with on appeal. (para 29)

A **(3)** The learned trial judge was justified in concluding that there was a *prima facie* case against the appellant at the end of the prosecution's case. His decision to call the appellant to enter a defence to the amended charge was supported by the evidence. (para 31)

B **(4)** The trial judge was correct to invoke the presumption under s. 42(1) of the Act. At the close of the prosecution's case the trial judge found that the prosecution had proved the two main ingredients of the offence, namely, that the gratification was given to or received by the accused and that the accused C accepted it as an agent of the Government of Malaysia. The appellant failed to rebut this presumption on the balance of probability. (paras 34 & 36)

(5) In criminal cases the burden to prove the guilt of the accused D lies on the prosecution throughout the whole case. The prosecution did not call Mr. Mora to testify but instead offered Mr. Mora as a witness. It was therefore up to the defence to decide whether to take up the offer by the prosecution. However if the defence did not call the witness that was offered to testify E no adverse inference could be drawn against the defence. By requiring the appellant to call Mr. Mora to rebut the prosecution's case the trial judge had imposed on the defence a burden which the law does not. It is not the duty of the appellant to prove his innocence. Therefore on this issue there had been a misdirection on the part of the trial judge. However, F this misdirection had not occasioned a miscarriage of justice in the circumstances of the case. There were other ample evidence for the prosecution to prove its case against the appellant and the trial judge had considered these evidences and had come to the finding as he did. (para 39)

G **(6)** PW9 had no knowledge about the appellant accepting or receiving money from PW1. The defence never challenged PW9 under cross-examination. The trial judge had not erred in considering the evidence of PW9. The appellant was not H prejudiced by that. (paras 42 & 44)

(7) The learned trial judge had applied the correct sentencing principles. He had taken into consideration the relevant factors such as public interest, seriousness of the offence, the deterrence factor and the mitigation by the appellant. (para 46)

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Case(s) referred to:
Basri Sirat v. PP [1999] 1 LNS 226 HC ***(refd)***
Mohamed Alias v. PP [1981] 1 LNS 200 HC ***(refd)***
Mohamed Mokhtar v. PP [1971] 1 LNS 84 HC ***(refd)***
Mohamed Taufik v. PP [1974] 1 LNS 95 HC ***(refd)***
PP v. Datuk Hj Harun Hj Idris (No 2) [1976] 1 LNS 97 FC ***(refd)***
PP v. Jamil Mahmod & Anor [1998] 1 LNS 312 HC ***(refd)***
PP v. Ku Hang Chua [1975] 1 LNS 131 HC ***(refd)***
PP v. Ling Tee Huah [1980] 1 LNS 212 CA ***(refd)***
PP v. Md Nor Hamid [2003] 1 LNS 591 HC ***(refd)***
PP lwn. Mohd Noor Yusof [2008] 7 CLJ 504 HC ***(refd)***
PP v. Yuvaraj [1968] 1 LNS 116 HC ***(refd)***
Ramli Sutu v. PP [1998] 5 CLJ 671 HC ***(refd)***
Rex v. Baskerville [1916] 2 KB 658 ***(refd)***

Legislation referred to:
Anti-Corruption Act 1997, ss. 11(a), 42(1)
Evidence Act 1950, s. 114(g)
Prevention of Corruption Act 1961, ss. 4(a), 14
Road Transport Act 1987, ss. 15(1), 26(1)

For the appellant - Anthony Tai; M/s Anthony Tai Advocates
For the prosecution - Muhammad Sinti DPP

Reported by Amutha Suppayah

JUDGMENT

Abdul Aziz Abdul Rahim J:

[1] The appellant was convicted and sentenced on an amended charge under s. 11(a) of the Anti-Corruption Act 1997 ('the Act') for accepting a gratification of RM100 from one Ong Su Ann (PW1) as an inducement forbearing not to take action against one Chong Fook Teck (PW6) who allegedly had committed an offence under s. 26(1) and s. 15(1) of Road Traffic Act 1987.

[2] The appellant was sentenced to 12 months imprisonment and a fine of RM10,000 in default six months imprisonment. The appellant was granted a stay of execution pending the disposal of this appeal.

[3] At the material time the appellant was an Enforcement Officer attached to the Enforcement Unit, Road Transport Department, Kuching.

[4] The appellant's appeal is against conviction and sentence. The appellant raised several grounds of appeal.

[5] The first ground is that the prosecution has not established a *prima facie* case on the essential ingredients of the offence to justify the calling of the defence. It was argued that the learned trial Sessions Court judge failed to embark on a maximum evaluation of the prosecution's evidence tested in cross-examination on the essential ingredient of the charge.

[6] The main evidence by the prosecution on the acceptance by the appellant of the gratification came from the testimonies of PW1 and PW6. The evidence is that 4 February 2005 at about 9.10am, PW1 was stopped by the appellant while driving a motor vehicle. PW1 was asked to produce his driving licence. But PW1 could not do so. PW1 admitted that he had no driving licence at the material time. PW1 told the appellant that if the appellant wanted to issue a summons the appellant has to do it quickly as he (PW1) was in hurry. The appellant then asked for PW1's identity card which PW1 subsequently gave to the appellant. But the appellant still refused to issue PW1 with a summons. Instead, PW1 testified that the appellant asked him to call the owner of the car, that he was driving, to come and see the appellant. Using one of the JPJ officer's handphone, PW1 called PW6 who later came to the scene. PW1 then tried to negotiate with the appellant and requested the appellant to forget the whole thing and asked whether there is any other way to make resolve the matter fast. PW1 then testified that one of the JPJ's officers present at the scene said 'when you see a road block you should have at least RM50 to settle'. After that, PW1 said the appellant let him continue on his journey. However, when PW1 asked for the return of his identity card, the appellant told PW1 that if he wanted his identity card back he could come to the JPJ office later that day at 2pm and to bring along RM100 to collect his identity card.

[7] The appellant then released PW1 and the latter went back to his employer's workshop. PW6 then contacted one of his customers known as Mr. Lee (PW8) for help. PW6 testified that Mr. Lee was a policeman. As it turns out Mr. Lee is an officer attached to the ACA. Soon afterwards Mr. Lee arrived at PW6's workshop with two other ACA officers. When PW6 had told the ACA officers about the incident, he was given two pieces of RM50 (exhs. P5 (a) and (b)) to be given to the appellant at the appellant's office, and was asked to remember the serial number of the two notes. The ACA was setting up a trap for the appellant.

[8] When PW1 and PW6 went to the appellant's office later that day, PW6 placed two (2) RM50 notes on the appellant's table. The evidence was that the appellant was surprised. After PW1 and PW6 left the appellant's office they gave a pre-arranged signal to the waiting ACA's officers indicating that the money had been given to the appellant. The ACA's officers then approached the appellant's office. On seeing the approaching ACA's officers the appellant grabbed the two RM50 notes on his table and quickly walked towards the toilet. He was followed by the ACA's officers. Nearing the toilet the ACA's officers heard the toilet being flushed. Thereafter the ACA's officers rushed to the septic tank where the flushed water from the toilet flowed. There they managed to retrieve one of the marked RM50 notes. Subsequently the appellant was arrested.

[9] It was submitted for the appellant that the prosecution must prove that the appellant received RM100 from PW1 and PW6. In this regard it was argued that PW1 and PW6 were trap witnesses.

[10] The law as to trap witness is that its evidence must be corroborated; and if it is not corroborated the learned trial judge must warn himself of the danger of convicting an accused on an uncorroborated evidence of such witness: *Mohamed Taufik v. PP* [1974] 1 LNS 95; *Mohamed Mokhtar v. PP* [1971] 1 LNS 84. The rational for this is that a trap witness is an interested party: *Ramli Sutu v. PP* [1998] 5 CLJ 671.

[11] Counsel for appellant submitted that the failure of the learned trial judge to warn himself of the danger of convicting on an uncorroborated evidence of a trap witness amounts to a misdirection that occasions a failure and a miscarriage of justice.

[12] The issue at this juncture is whether the learned trial judge had misdirected himself on corroboration of PW1 and PW6's evidence and whether there is corroboration of their evidence.

[13] Learned counsel for the appellant submitted that the learned trial judge misdirected himself on corroboration of PW1's and PW6's evidence. He further submitted that the learned trial judge's finding at p. 183 of the appeal record that the evidence of PW1 and PW6 as to the money been handed over to the appellant was corroborated and therefore attracts the presumption under s. 42(1) of the Act is unsupported by evidence in this instant case.

[14] I do not find any merit in these submissions. There is no doubt that PW1 and PW6 were trap witnesses. However this fact is amply recognized by the learned trial judge when in his judgment at p. 185 of the appeal record said that:

> [I]n the instant case, though the money was not found in the possession of the accused after when the ACA's officers conducted the arrest, that does not restraint this Court from making a *prima facie* finding that the accused had received the gratification from PW1 as there is direct and circumstantial evidence to support so.

[15] There are evidences to support this conclusion. PW1 testified that he made several phone calls to the appellant requesting for the return of his identity card. The appellant denied receiving the phone calls. However the appellant said the caller was unknown to him; and because he was annoyed with the calls he had asked the caller to come to his JPJ's office. This was fact that was found by the learned trial judge as the truth. In his grounds of decision at p. 133 of the appeal record, the learned trial judge, 'have noted there were not less than three telephone calls from PW1 to meet and just to collect the I.C. from the accused whereby the accused has not taken any action to return and/or summon PW1'. Furthermore the finding lends credibility to PW1's testimony that he was asked by the appellant to come to the appellant's JPJ office to collect the identity card. If that is not true, why would the ACA's officers set up plans to have the marked money handed over to the appellant at the appellant's JPJ office since it is reasonable to expect in the circumstances that the ACA would only hatch a plan for the delivery of the marked money in accordance with the prior arrangement between the appellant and PW1.

[16] With regard to this evidence, counsel for the appellant submitted that the learned trial judge was wrong to have taken the four scenarios stated at p. 134 of the appeal record saying that these scenarios gave rise to different inferences, some of which are inferences favourable to the appellant. I do not agree. The four scenarios, in my view, are nothing more than inferences of fact that the learned trial judge had made based on the evidence before him. I think the learned trial judge has the right to draw any factual inference which he deems reasonable on the evidence and circumstances of the case. The appellate court ought to be slow in disagreeing with the inferences drawn unless the inferences are not supported by evidence. In this case, the learned trial judge had considered the fact that the appellant was a senior officer in the team that conducted the operation and in fact the appellant was the head of the operation on the material day. On this fact which is

not disputed the trial judge had asked himself as to why the appellant had not issued the summons to PW1 when he was in the position to do so and when it so blatantly clear that PW1 has committed a traffic offence.

[17] It is also incontrovertible evidence in this case that PW1 and PW6 had gone to the appellant's office accompanied by Mr. Lee (PW8), the ACA's officer. However at the appellant's office, only PW1 and PW6 were allowed into the appellant's office which was located behind the public counter. PW8 was asked to wait outside the counter near the benches meant for public waiting area. However from where he was standing outside the appellant's office, PW8 testified that he could see what was going on in the office. However PW8 testified that he could not see when the marked money was actually given to the appellant because at one point of time when PW1 and PW6 were still inside the appellant's office, the appellant took them to a place in the office which has a partition and PW8 could not see what transpired behind the partition. PW8 testified that after PW1 and PW6 came out of the place hidden by the partition they came to him to inform that the appellant had already taken the money. When the three of them left and came out of the JPJ area, PW8 waved his hand to the two other ACA's officers waiting outside to signal that the money had been passed. This evidence is corroborated by the testimonies of PW10 and PW11, the two ACA's officers who were on standby to conduct the raid.

[18] On receiving the signal from PW8, the two ACA's officers PW10 and PW11 rushed to the appellant's office. On approaching the appellant's office PW11 testified that he saw a male JPJ officer holding a blue colour diary walking in a fast manner towards the toilet in Block A of the JPJ Office. PW11 followed the JPJ officer to the toilet and found that the JPJ officer had locked himself in the 2nd toilet. PW11 kicked the door to the toilet and asked the JPJ officer to open the door and come out. But the JPJ officer did not do so. Then PW11 heard the flushing of the toilet and the sound of running water from inside the toilet. PW11 then instructed PW10 to climb over through the toilet next to the 2nd toilet and PW10 did so. PW10 shouted to the JPJ officer 'Keluar, Keluar'. With that the JPJ officer opened that toilet door but he did not come out. According to PW10's testimony the JPJ officer, who was in JPJ uniform 'looked very down' and PW11 had to pull him out of the toilet. From the name tag on the JPJ officer's shirt, PW12 saw the name was Khirudin, the appellant.

[19] PW11 and PW12 conducted a body search on the appellant after he came out from the toilet. However the trap money was not found on him. PW11 suspected that the trap money had been flushed down in the toilet. The appellant was then handed over to the other two ACA's officers PW12 and PW15. Meanwhile PW10 and PW11 went to see the Assistant Director of JPJ to inform about the investigation and to assist the investigation.

[20] The Assistant Director of JPJ then directed one Mr. Mora and PW5 to assist PW10 and PW11 to open up the septic tank behind Block A of the JPJ building to retrieve the marked money which PW11 believed had been flushed down the toilet by the appellant.

[21] In the course of their investigation in the toilet used by the appellant and the septic tank at the JPJ office the ACA's officers with the assistance of the JPJ personnel found certain items. From the toilet bowl in the toilet used by the appellant, PW13, another ACA officer who assisted in the investigation, recovered a handphone. From the septic tank ID3(d) Mr. Mora, PW15, PW11, PW10 and PW5 found two pieces of RM50 notes floating in it. The two RM50 notes were taken out from the septic tank in the presence of the appellant. The two RM50 notes were identified in court during the trial as the marked notes that were given to PW1 and PW6 to be given to the appellant as trap money. The ACA's investigation team also recovered a phone sim card from the septic tank.

[22] In my view the unbroken chain of events and evidence beginning from the setting up of the trap and the recovery of the trap money and the other items of exhibit from the toilet bowl and the septic tank provide sufficient corroboration to the story by PW1 and PW6.

[23] Corroborative evidence need not be direct evidence that the accused committed the crime. Circumstantial evidence can also be a corroborative evidence: *Basri Sirat v. PP* [1999] 1 LNS 226; *Rex v. Baskerville* [1916] 2 KB 658 and *PP v. Ling Tee Huah* [1980] 1 LNS 212.

[24] In *PP v. Datuk Hj Harun Hj Idris (No. 2)* [1976] 1 LNS 97; [1977] 1 MLJ 15 pp. 19-20 the Federal Court ruled as follows:

> It is not necessary that the corroboration should be of actual commission of the crime, for then there would be independent evidence of the commission of the offence. It would be enough corroboration if there is independent evidence of relevant circumstances connecting the accused with the crime.

[25] In this instant, there is nothing in the evidence to suggest that PW1 and PW6 had put or flushed the marked RM50 notes into the toilet which later found their way to the septic tank. There is also no challenge put to them that they had done so. The fact is that the last person that had the trap money before they were recovered from the septic tank was the appellant himself. In this respect, the appellant did not challenge in cross-examination that he went to the toilet and flushed something.

[26] The conduct of the appellant in locking himself up in the toilet despite being asked by the ACA's officers to come out and the look on him when he opened the toilet door which was described by PW10, 'he looked very down' is relevant to show the appellant's guilt.

[27] Next, counsel for the appellant submitted that the finding of the marked notes in the septic tank does not constitute corroboration. He argued that PW1 in his testimony under cross-examination had said that of the two RM50 notes he allegedly gave to the appellant, one piece 'belonged to me' and 'the other piece belonged to BPR'. Counsel for the defence submitted that PW1, was never asked to clarify on this testimony by PW1.

[28] These submissions by learned counsel for the appellant may be considered together with the other ground of appeal raised by appellant which is that PW1 and PW6 had given two conflicting versions on the money given to the accused. It was submitted that PW1 testified that one piece of the RM50 note given to the appellant was his own money and the other piece of RM50 belonged to the ACA. Whereas PW6 testified that the money that was given to the appellant by PW1 was the same money that was given by the ACA's officers to PW6.

[29] The learned trial judge has addressed this issue in his judgment at p. 186 of the appeal record. Having considered the evidence before him on this point, the learned trial judge concluded that 'there was a slight discrepancy' in the evidence by PW1 on this issue under cross-examination *vis-a-vis* the testimony of PW6. However, the learned trial judge found that the discrepancy is not material and not amounting to a conflicting version of evidence.

A And at p. 187 of the appeal record the learned trial judge has satisfied himself that 'as a whole the trapped (*sic*) money was found in the septic tank were *prima facie* trapped (*sic*)'. This is a finding of fact by the learned trial judge who has had the advantage of hearing and seeing the witnesses giving evidence before him and B observing their demeanour while doing so. The learned trial judge therefore is the better judge of the fact in issue than the appellate court. In the circumstances such finding should not be easily disturbed or interfered with on appeal.

C **[30]** As to the discrepancy in the testimony of PW1 and PW6 as found by the learned trial judge, I agree with his conclusion that the discrepancy does not make PW1's or PW6's evidence unacceptable and that they were unreliable witnesses. In *Mohamed Alias v. Public Prosecutor* [1981] 1 LNS 200 the court held that:

D > The fact that there are discrepancies in a witness's testimony does not straightaway make him unreliable witness and make the whole of his evidence unacceptable. It is open to the court having observed the demeanour of the witness and after careful consideration of such discrepancies to accept part of the witness evidence if it considers them to be true.

E **[31]** Having regard to the evidence as a whole in this case, I find that the learned trial judge was justified in concluding that there is a *prima facie* case against the appellant at the end of the prosecution's case. His decision to call the appellant to enter a F defence to the amended charge was well supported by the evidence. Having scrutinized his written grounds of decision at pp. 124-143 of the appeal record, I am of the view that the learned trial judge has given a maximum evaluation of the evidence before him before he called the appellant to enter his defence.

G **[32]** The main defence by the appellant is that of a denial. The appellant denied asking for any money from PW1 for not taking any action against PW1 for committing a traffic offence of driving without a valid driving licence and also denied to have received the money at his office. This defence was considered by the learned trial H judge and he had rejected it as 'untruth' and a 'blatant denial'. At pp. 135-136 of the appeal record, the learned trial judge addressed this defence and his impressions of it are as follows:

> The evidence of the accused that when PW1 and his 2 friends left the accused's table after handed over the money whereby the accused I denied to have received and took the said money is most suspect of its truthfulness and again is blatant denial.

> The act of the accused when the accused immediately stood up and at that time saw 3 persons shouted at him, 'jangan lari,' and rushed to the toilet and locked himself in the toilet and then dropped his hand phone and tried to patch them and due to the fact that the toilet door was knocked and kicked by the ACA's officers, the accused's hand phone accidentally fell into the toilet bowl because he was shivering was really a 'dramatic' story which truthfulness of its (*sic*) is most suspect. The fact that the accused was trying to flush the toilet in order to retrieve the hand phone from the toilet bowl and took his time to urinate in the toilet bowl before he opened the door is again most unbelievable and not reasonable act.
>
> I could not figure out and imagine why the accused has to grab whatever things on the table and rushed to the toilet and locked himself inside it and flushed the toilet several times, upon seeing the 3 ACA's officers entered into JPJ's office if he did not commit any wrong and/ or have any guilty minds?

[33] The above passage in the written grounds of decision by the learned trial judge speaks for itself as to the learned trial judge's evaluation and assessment of the evidence in this case. And I find no cogent reasons to fault his finding and conclusion.

[34] On the evidence in this case the learned trial judge was correct to invoke the presumption under s. 42(1) of the Act. The section presumed that if it is proven that any gratification has been accepted or agreed to be accepted, the gratification is accepted or agreed to be accepted corruptly. At the close of the prosecution's case and having considered the evidence adduced by the prosecution before him the learned trial judge found that the prosecution had proved the two main ingredients of the offence in this case that the gratification was given to or received by the accused and that the accused accepted it as an agent of the Government of Malaysia whilst attached as an Enforcement Officer with the Enforcement Unit in the Road Transport Department, Kuching.

[35] In *PP v. Mohd Noor Yusof* [2008] 7 CLJ 504 it was held that once the prosecution has proved that gratification was given and accepted, the presumption under s. 42(1) of the Act comes into operation. With that, the burden now shifts to the accused or appellant to show on the balance of probability that the gratification was not received corruptly. In an earlier Privy Counsel case of *PP v. Yuvaraj* [1968] 1 LNS 116, the court, in dealing with the presumption under s. 14 of the old Prevention of Corruption Act 1961, a section similar to the present s. 42(1) under the Act also stated the same principle.

[36] On the evidence in this instant case, I agree with the learned trial judge that the appellant has failed to rebut this presumption on the balance of probability.

[37] The next ground of appeal by the appellant is that the learned trial judge was wrong to draw adverse inference under s. 114(g) of the Evidence Act 1950 against the appellant for not calling Mr Mora to testify. Mr. Mora is a JPJ officer who had assisted the ACA's officers to recover the trap money exhs. P5a and P5b from the septic tank. Mr Mora was not present during the road block conducted by the appellant when the appellant stopped PW1 for driving without valid driving lessons.

[38] Learned counsel for the appellant submitted that by drawing the adverse inference against the appellant the learned trial judge has shifted the burden of proof to the defence.

[39] It is trite law that in criminal cases the burden to prove the guilt of the accused lies on the prosecution throughout the whole case; and this burden is to prove the case beyond reasonable doubt. However the prosecution may conduct its case in any way that it deems fit. The prosecution may call any number of witnesses or any person relevant to its case as a witness. In this instant case, the prosecution did not call Mr Mora to testify. Instead the prosecution offered Mr Mora as a witness. It is therefore up to the defence to decide whether to take up the offer by the prosecution. However if the defence refuses to take up the offer and did not call the witness who was offered to testify, no adverse inference can be drawn against the defence. In this regard I agree with the appellant's submissions that by requiring the appellant to call Mr. Mora to rebut the prosecution's case the learned trial judge had imposed on the defence a burden which the law does not. It is not the duty of the appellant to prove his innocence. Therefore on this issue there has been a misdirection on the part of the learned trial judge. That said, I do not think the misdirection has occasioned a miscarriage of justice in the circumstances of the case. In my view there are other ample evidence for the prosecution to prove its case against the appellant and the learned trial judge had considered these evidences and has come to the findings as he did.

[40] With regards to the grounds in para. (g)(i)(ii) of the appellant's petition of appeal that the trial judge had erred and failed to direct his mind adequately or at all regarding the identity of the JPJ officers who talked to PW6 at the road block and that there was no evidence to show that the appellant had ever demanded money

from PW6. I accept the submissions by the respondent/prosecution that the demand for the gratification or solicitation is not an ingredient of the offence that need to be proved in this case. The appellant was charged under s. 11(a) of the Act for corruptly accepting gratification. Under the section solicitation is not an ingredient.

[41] In *PP v. Jamil Mahmod & Anor* [1998] 1 LNS 312 [1998] 4 MLJ 681, 691 the court was dealing with an offence under s. 4(a) of the 1961 Anti-Corruption Act, which is in *pari materia* or identical with s. 11(a) in the present case, and the court held that there the learned trial judge had fallen into a serious error in requiring the prosecution to prove the ingredient of solicitation when it was never an ingredient of the charge against the accused. This principle was also stated in *PP v. Md Nor Hamid* [2003] 1 LNS 591.

[42] In para. (h) of his petition of appeal, the appellant also raised the issue that the learned trial judge had erred in taking into consideration the evidence of PW9 who was arrested in connection with this instant case. It was submitted in so doing the learned trial judge had failed to apply his mind to the proposition of law laid down in *Public Prosecutor v. Ku Hang Chua* [1975] 1 LNS 131. In my view this ground is without merit to persuade me to upset the decision by the learned trial judge. As submitted by the respondent/ prosecution, PW9 was present at the road block when PW1 was stopped and duly checked for his driving licence. PW9's evidence was that when PW1 was stopped he took PW1's identity card and handed it to the appellant. PW9 was later detained by ACA in the course of investigation into this case. But he was never charged with any offence; and in fact he was released subsequently. Perusal of PW9's evidence shows that he has no knowledge about the appellant accepting or receiving money from PW1 in relation to the offence committed by PW1. It is also pertinent to note that the defence never challenged PW9 under cross-examination.

[43] In relation to PW9's evidence, the facts in *PP v. Ku Hang Chua (supra)* is distinguishable in that, in that case the prosecution's witness was originally charged with the accused and later the charge was withdrawn by prosecution with a condition that the witness was only to be discharged not amounting to acquittal. The witness then testified as a witness for the prosecution.

[44] In the circumstances therefore, I agree with the respondent that the learned trial judge had not erred to take into consideration the evidence of PW9. The appellant was not prejudiced by that.

[45] All things considered, I am of the view that the appeal against conviction by the appellant shall be dismissed and the order of conviction by the learned trial judge below is hereby affirmed.

[46] As to the appellant's appeal against sentence, the petition of appeal does not contain any ground to challenge the sentence imposed as manifestly excessive or unlawful. Perusal of the appeal record at pp. 110-116 shows that the learned trial judge had applied the correct sentencing principles. He had taken into consideration the relevant factors such as public interest, seriousness of the offence, the deterrence factor and the mitigation by the appellant. The learned trial judge also has referred to a number of authorities that established these principles. In the circumstances, I am inclined not to interfere with the sentence passed. Accordingly, the appellant's appeal against sentence is also dismissed.

[47] Finally, having dismissed the appeal, at upon oral application by counsel for the appellant, I granted the appellant a stay of execution pending his appeal against this decision to the Court of Appeal on the same terms and conditions as the stay granted by the learned trial judge pending the disposal of this appeal by this court. The stay however is conditioned upon the appellant paying the fine of RM10,000 imposed by the learned trial judge.

[48] Order accordingly.